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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Tehama)

In re J.H., a Person Coming Under the Juvenile Court
Law.

C095449

TEHAMA COUNTY DEPARTMENT OF SOCIAL
SERVICES,

(Super. Ct. No. 21JU000031)

Plaintiff and Respondent,

v.

J.B.,

Defendant and Appellant.

Mother J.B. (mother) of minor J.H. appeals from the juvenile court's orders terminating parental rights and freeing the minor for adoption. (Welf. & Inst. Code, § 366.26.)¹ Mother contends conditional reversal is required because the Tehama County

¹ Undesignated statutory references are to the Welfare and Institutions Code.

Department of Social Services (Department) and the juvenile court failed to comply with the inquiry and notice requirements under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.); she adds that the court erred in terminating parental rights without a proper ICWA finding.

We agree the matter must be remanded for ICWA compliance; we conditionally affirm the juvenile court's orders terminating parental rights subject to ICWA compliance on remand.

FACTUAL AND PROCEDURAL BACKGROUND

Given the narrow nature of the contentions on appeal, we recite only the necessary relevant facts. In June 2021, the Department filed a dependency petition pursuant to section 300, subdivisions (b) and (j). The minor was detained as a newborn after mother tested positive for amphetamine before and immediately after the minor's birth. Mother's parental rights as to the minor's sibling had been terminated in 2021.

In a June 2021 detention report, the Department noted mother had told the social worker she believed she had Indian ancestry, with family members in the Wintun and Cherokee tribes, and some family still living on the Cherokee reservation. She told the court during a June 2021 hearing that the minor's maternal great-grandfather had Wintun, Cherokee, and Choctaw ancestry and had been a registered member of a tribe. Mother indicated she would ask the minor's grandfather (who was mother's father and lived in Oklahoma), for more information.

The social worker noted in the July 2021 jurisdiction report that she had attempted to reach that grandfather, but the number she had for him was no longer in service. Other potential contact numbers for him were called, and she was only able to leave a message on one of those numbers. She next contacted one of mother's adult children, who said they were not aware of any Indian heritage. She asked mother several times to provide a phone number for the grandfather, but the record does not indicate he was ever reached regarding this minor's case.

In July 2021, the juvenile court sustained the petition. Later that month, the Department filed an ICWA-030 form and noticed various tribes and the Bureau of Indian Affairs.

After the August 31, 2021, contested disposition hearing, the juvenile court declined to order reunification services for the parents and set a section 366.26 hearing. While testifying at the hearing and responding to questions about drug use and testing, mother indicated (in somewhat of a non-sequitur) that she had not been offered testing services while she was “trying to get all that information,” meaning the Department “wanted [her] to fill out the social worker paper to get family tree history” but that she did not do so because “I don’t have Indian heritage.” Neither counsel nor the juvenile court followed up on this particular assertion by mother, and at the conclusion of the hearing the court did not make an express finding as to whether the ICWA applied.

In October 2021, the Department provided ICWA notice to additional tribes and some of the tribes who were noticed earlier responded in the negative as to the minor’s eligibility. In the November 2021 section 366.26 report, the Department recommended that parental rights be terminated and adoption be ordered as the permanent plan for the minor. With respect to the ICWA, the Department noted it had spoken with the minor’s maternal grandfather in March 2020 regarding a prior dependency case involving mother and a different child and the grandfather had denied any Indian ancestry.

However, the section 366.26 report concluded that the ICWA “does or may apply.”

At the December 21, 2021, section 366.26 hearing, the juvenile court admitted the November 2021 section 366.26 report into evidence and the Department introduced no additional exhibits or testimony. The parents testified, but Indian heritage was not discussed. In its brief oral order at the conclusion of the hearing, the juvenile court did not mention the subject of Indian heritage or the ICWA.

In its written order, the juvenile court terminated parental rights and ordered adoption as the permanent plan. Under the heading of “Other required findings,” the order contained the finding that the “ICWA does or may apply.” The order contained no other findings regarding the ICWA.

Mother timely appealed. The case was fully briefed in March 2022 and assigned to this panel that same month. The parties did not request argument.

DISCUSSION

Mother alleges a number of deficiencies in compliance with the ICWA by the Department and juvenile court; because we agree with her final contention and find it dispositive, we need not address the others. Mother argues the juvenile court erred when it found the ICWA “does or may apply” but failed to make the remaining required ICWA findings prior to terminating parental rights, as required by section 366.26, subdivision (c)(2)(B). We agree, and consequently only conditionally affirm the orders, remanding the matter for compliance with the ICWA.

We need not explain the Department’s and juvenile court’s shared obligations of inquiry and duty to determine whether the ICWA applies; in this case, on that issue, there is no significant dispute. (See *In re D.S.* (2020) 46 Cal.App.5th 1041, 1048 [describing both entities’ “ ‘affirmative and continuing duty’ in every dependency proceeding to determine whether [the] ICWA applies”]; *In re Austin J.* (2020) 47 Cal.App.5th 870, 883 [describing obligations when there is a “reason to believe” a minor has Indian heritage]; § 224.2, subds. (b), (e).)

Here, the dispositive issue turns on the facts that the required findings were not made, and the findings that were made were conflicting and incomplete. As we have described, the Department stated in its November 2021 section 366.26 report that the ICWA “does or may apply,” and the juvenile court echoed this finding in its written order terminating parental rights. Respondent cursorily argues this finding was most likely the result of a clerical error, arguing the record does not suggest the minor is an Indian child.

But the juvenile court did not address the applicability of the ICWA at *any* point during the contested section 366.26 hearing or subsequent findings, and the only evidence introduced on the topic at the hearing was the report from the Department indicating the ICWA *did or may* apply, matching the court's later order.

The juvenile court must decide “whether [the] ICWA applies” before it terminates parental rights (*In re D.S.*, *supra*, 46 Cal.App.5th at p. 1048), in part because it must “make certain findings affecting an Indian child before ordering foster care or terminating parental rights.” (*In re M.B.* (2010) 182 Cal.App.4th 1496, 1502.) The court's finding here in no way resolves whether the ICWA applies. And, if the ICWA *does* apply, the order omitted numerous other required findings.

Thus, we agree that the juvenile court failed to make the findings under section 366.26, required by the ICWA, prior to terminating parental rights. Under the circumstances, we must remand the matter for compliance with the ICWA, and only conditionally affirm the orders terminating parental rights. Any remaining arguments as to adequacy of notice, inquiry, and completion of forms may be raised on remand for ICWA compliance.

DISPOSITION

The orders terminating parental rights are affirmed subject to full compliance with the ICWA as described in this opinion. If, on remand, the juvenile court determines the ICWA applies, the court shall vacate its previous orders terminating parental rights and conduct further proceedings consistent with the ICWA, including a new section 366.26 hearing. (25 U.S.C. § 1914; § 224, subd. (e).)

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Robie, J.